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## United States Senate

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October 4, 2013

Mr. Richard Clarke  
Good Harbor Security Risk Management  
2020 K Street NW, Suite 400  
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Mr. Michael Morell  
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Mr. Peter Swire  
Georgia Institute of Technology  
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Dear Mr. Clarke, Mr. Morell, Mr. Stone, Mr. Sunstein, and Mr. Swire:

As your group completes its review of activities conducted under the Foreign Intelligence Surveillance Act (FISA), I urge you to support comprehensive legislation to address the lack of transparency surrounding domestic surveillance programs. As Chairman of the Senate Judiciary Subcommittee on Privacy, Technology and the Law, I have introduced a bill, the Surveillance Transparency Act of 2013, that would address this issue. It is co-sponsored by 11 Senators, including the Chairman of the Senate Judiciary Committee, and has been endorsed by bipartisan civil society groups and most of the country's leading Internet companies. I urge you to support the legislation in your report to the President.

When the Snowden leaks began, many Americans were shocked to learn of the extent of the National Security Agency's activities. For many years, the full extent of the surveillance programs designed to protect Americans has been a secret to all but a few members of the intelligence community and legislators. And although members of Congress had the opportunity to be briefed on these programs, we were barred from speaking about them publicly. Furthermore, the companies compelled to provide information to the government have been prohibited from even acknowledging that they received information requests under the FISA.

Giving due weight to both national security and civil liberties is one of our democracy's most important challenges – and it's a challenge that I think most Americans appreciate and understand. But when Americans lack the most basic information about our domestic surveillance programs, they have no way of knowing whether we're getting that balance right. Unfortunately, with the exception of a few modest reporting provisions, the key sections of the



FISA – including Section 215 of the PATRIOT Act and section 702 – lack any substantial public transparency requirements. They lack any requirement that the government disclose even a rough estimate of the number of Americans whose information is collected by the government – or the number of Americans whose information has actually been reviewed by national security officials. While a few companies have been authorized to disclose very limited statistics about the requests they receive, they have been able to do so only after *ad hoc*, extensive negotiations with high-level government officials.

This lack of transparency undermines our democracy. Voters can't reach an informed opinion about surveillance programs when they have no way of knowing if those programs affect tens, hundreds, thousands, or millions of their fellow citizens. The gag orders that technology companies are subject to also needlessly hurt America's technology sector at home and abroad. The Information Technology & Innovation Foundation recently estimated that a mere 10% drop in American cloud computing companies' foreign market share would result in a loss of \$21.5 billion in revenue over the next three years.

We are now in the midst of an important public conversation about surveillance and privacy. It's hard to have a productive conversation when it concerns secret programs of secret scope authorized by secret legal opinions issued by a secret court.

I think that the President, Director Clapper and General Alexander appreciate the need for greater transparency. In the past two months, the Director of National Intelligence has declassified thousands of pages of critical documents, decisions and legal opinions regarding these programs. Director Clapper has also voluntarily pledged to declassify and disclose annually the number of orders issued and "targets" affected under each key FISA authority. These are positive steps taken in good faith. The document releases in particular have been helpful in allowing the public to understand the successes and failures of existing oversight mechanisms. But the ongoing disclosures are too little – and they need to be permanent.

As an initial matter, existing law *already* requires public reporting of the number of orders issued under "traditional" FISA (50 U.S.C. § 1807), section 215 of the PATRIOT Act (50 U.S.C. § 1862(c)(1)), and the various National Security Letter authorities. The promised public reporting on the number of orders issued under other authorities – such as section 702 of the FISA – is positive, but these statistics do little to explain the scope of the surveillance programs that these orders authorize. For example, last year only 212 orders were issued under section 215 of the PATRIOT Act. This seems like a small number, but recently declassified documents revealed that just a few of these orders allowed the government to collect "substantially all" of the telephony metadata from the country's leading telecommunications companies. ODNI has also failed to publicly explain how it will define the term "target." Most critically, however, the additional promised reporting is being conducted *on an entirely voluntary basis*; this or any future Administration could stop this reporting at will.

My bill would address these problems. It would require the government to report annually on (a) the number of Foreign Intelligence Surveillance Court orders issued under sections 214 and 215 of the PATRIOT Act and section 702 of FISA; (b) the general categories of information collected from U.S. persons; (c) the number of U.S. persons whose information was

*collected* under the categories; (d) the number of U.S. persons whose information was *actually reviewed* by federal agents; and (e) where applicable, the number of queries run on this data, including the number of queries run based on the data of U.S. persons. For each of those key authorities, the bill would allow companies to voluntarily disclose the number of orders they received and complied with; the general categories of information they produced; and the number of users whose information was produced in the categories.

The bill includes less detailed reporting requirements and disclosure provisions for sections 105, 703, and 704 of FISA—three authorities that do not involve the bulk collection of Americans' records. To protect national security, all provisions prohibit the government and companies from disclosing the precise number of individuals affected under a particular authority if that number is less than 500.

I am appending a copy of my legislation – and a summary of it – to this letter. There is strong support for this measure in Congress, civil society, and industry. Earlier this week, America's leading technology companies—including Apple, Google, Microsoft, Facebook, Twitter, and Yahoo—endorsed my bill and sent a letter urging Congress to pass it. They were joined by a bipartisan coalition of progressive, centrist and conservative civil society groups. Furthermore, 11 of my Senate colleagues are cosponsors: Sens. Patrick Leahy (D-Vt.), Richard Blumenthal (D-Conn.), Richard Durbin (D-Ill.), Tom Harkin (D-Iowa), Edward J. Markey (D-Mass.), Jeff Merkley (D-Ore.), Jon Tester (D-Mont.), Mark Udall (D-Colo.), Tom Udall (D-N. Mex.), Elizabeth Warren (D-Mass.), and Ron Wyden (D-Ore.) have all pledged their support.

Transparency is a basic tenet of democracy and a necessary component of reform. The Surveillance Transparency Act of 2013 would be a permanent, comprehensive means to achieve transparency and give the electorate the information it needs to reach an informed opinion about these surveillance programs. I urge the Review Group to support it.

Thank you for your time. I look forward to reading your final report, and I hope my bill will have your support. If you have any questions, please do not hesitate to contact me.

Sincerely,

A large, stylized handwritten signature in black ink, which appears to read "Al Franken". The signature is fluid and cursive, with a long horizontal stroke at the end.

Al Franken  
Chairman, Senate Judiciary Subcommittee  
on Privacy, Technology and the Law